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In the Supreme Court of the United States

No. 430

RICHARD THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 427-433; Pet. App. 1-8) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 18, 1955 (R. 434), and a petition for rehearing was denied on August 29, 1955 (R. 435). The petition for a writ of certiorari was filed on September 28, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether travel of individual defendants at different times across state lines as part of their

activities resulting in an unlawful sale of securities constituted use of the instrumentalities of interstate commerce in the sale of securities within the purview of Section 17(a)(2) of the Securities Act of 1933.

2. Whether the trial court abused its discretion in permitting the prosecutor to ask leading questions of government witnesses.

STATUTE INVOLVED

Section 17(a)(2) of the Securities Act of 1933, 48 Stat. 74, 84, 15 U.S.C. 77q (a)(2), provides:

> FRAUDULENT INTERSTATE TRANSACTIONS
>
> Sec. 17(a). It shall be unlawful for any person in the sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly——
>
> * * * * *
>
> (2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, * * *.

Section 24 of the Securities Act of 1933, 48 Stat. at 87, 15 U.S.C. 77x, in pertinent part provides:

> PENALTIES
>
> Sec. 24. Any person who willfully violates any of the provisions of this title, * * * shall

upon conviction be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner and one Powell were convicted (R. 24-25) under three counts of an indictment (R. 3-12) returned in the United States District Court for the District of Arizona, charging fraudulent sales of securities by use of the mails and the means of interstate commerce in violation of Section 17(a)(2) of the Securities Act of 1933, 15 U.S.C. 77q(a)(2). The first two counts (R. 3-8) were predicated upon the same sale of Thomascolor, Inc., stock to a Mr. and Mrs. George by means of untrue statements and omissions of material facts. The difference between the first two counts was that the first alleged use of the mails in consummating the sale (R. 7), while the second alleged use of a means of interstate transportation, in that the defendants caused Powell to travel by commercial airliner from Los Angeles, California, to Phoenix, Arizona (R. 8). The third count charged a similar fraudulent sale of stock to one Bailey Spencer, and alleged that in this sale the defendants caused petitioner to travel by private motor vehicle from Los Angeles to Phoenix and Wilcox, Arizona (R. 8-10). The two defendants were acquitted (R. 24-25) on a fourth count (R. 10-12) which charged a conspiracy to commit the three substantive offenses.

Petitioner was given a general sentence of imprisonment for 18 months and fined $1,000 (R. 34-35). Only petitioner appealed (R. 36). His conviction was unanimously affirmed (R. 434).

1. The evidence adduced at the trial was substantially undisputed. In so far as here pertinent, it may be summarized as follows:

Petitioner had invented a photographic process for converting black and white film to color film, and formed a corporation known as Thomascolor, Inc., of which he was president (R. 339, 154, 115). In 1947, Thomascolor attempted public financing and filed a registration statement with the Securities and Exchange Commission (R. 96-97). Following the termination of stop order proceedings, the registration was allowed to become effective (R. 97, 99). The offering was unsuccessful, and only two or three small sales of the stock were made (R. 100-101). In February or March 1948, the registration statement was withdrawn (R. 99-101). Thereafter, Ebasco Corporation, a consulting firm of engineers, attempted unsuccessfully to obtain private financing for Thomascolor (R. 63, 66, 67, 85, 95-96). Ebasco did not agree to list Thomascolor stock on the New York Stock Exchange, and no such listing was made (R. 85, 195-196).

Gov. Ex. 1, an Ebasco report regarding Thomascolor, completed in November 1948 and reviewed by petitioner and Powell (R. 15, 70, 72, 73-74, 78-79), showed, *inter alia,* that "[a]t no time has commercial production been undertaken nor has any income of consequence resulted to any of the companies or syndicates"; that "[f]or all practical purposes the company is and has been insolvent since December, 1947" (R. 76); and that "unless prompt and concerted action is taken, receivership seems inevitable" (R. 77). Eventually bank-

ruptcy proceedings were filed against Thomascolor (R. 192).

a. *The George sale.*—In December 1948, Powell in Los Angeles telephoned George in Phoenix asking that he come to California to investigate a good job with Thomascolor (R. 298-299). George and his wife flew to California (R. 300). The next day, they went with Powell and petitioner for an inspection tour of the Thomascolor plant (R. 300-302). Both petitioner and Powell specifically told Mr. and Mrs. George that the Thomascolor stock had been underwritten by Ebasco for six dollars per share; that it would go on the New York Stock Exchange on March 15, 1949; and that the company would go into production within ninety days (R. 303, 304-305, 319, 355-356). George was promised a salary of about $600 a month and was asked to purchase stock to show his faith in the company (R. 302, 304). On December 29, 1948, George, in writing (Gov. Ev. 33; R. 20, 308), agreed to purchase from petitioner's personal stockholdings 1,000 shares of Thomascolor stock for $5,000 (R. 308-309, 305). On that same afternoon Powell returned by airplane with the Georges to their home in Phoenix (R. 310).

Petitioner and Powell came to George's home at Phoenix on January 1, 1949, and urged him to raise the $5,000 as soon as he could (R. 310-312). On January 2 or 3, at Frank's Auto Court in Willcox, Arizona, George gave Powell in petitioner's presence $1,400 as partial payment for the stock (R. 312-313). A stipulation was entered into by counsel that Mrs. George, if called as a witness,

would testify substantially as her husband had, and would also testify that three checks (Gov. Exs. 22, 24, 35; R. 20, 357-358) were mailed by the Georges from Phoenix to Thomascolor in Los Angeles pursuant to instructions from petitioner and Powell (R. 356-358, 361-362). George identified Gov. Ex. 22 and his signature on the back of it (R. 315, 316), and petitioner's secretary identified the indorsements on Gov. Exs. 22 and 24 as petitioner's (R. 224-225).

b. *The Spencer sale.*—On January 1, 1949, Spencer met petitioner and Powell at the Hotel Adams in Phoenix at Powell's invitation to discuss purchase of Thomascolor stock (R. 258-259). Both petitioner and Powell specifically stated that the company was ready to go into production within thirty days and that its financing had been completed (R. 261-262). On January 3, 1949, at Willcox, Powell delivered a distributorship option agreement (Gov. Ex. 30; R. 18, 264) to Spencer, and received Spencer's check for $3,000 (Gov. Ex. 25; R. 19, 268), made payable to petitioner at Powell's instruction, in payment for the stock and distributorship (R. 263, 264, 266, 267-268, 270). This check was given to Powell in petitioner's presence (R. 286-287), and was indorsed by petitioner (R. 225). Later Spencer received the stock certificates in the mail (R. 19, 268-269).

2. The facts relating to (a) the trial court's rulings as to the propriety of certain questions challenged by petitioner as leading and suggestive, and (b) the context in which these questions were asked, are set forth, *infra* at pp. 8-11.

ARGUMENT

1. The principal question raised by the petition for certiorari (Pet. 2, 7-8) relates to whether the travel of petitioner and his co-defendant Powell from California to Arizona, in selling the Thomascolor stock to the defrauded purchasers, constituted a use of the instrumentalities of interstate commerce within the meaning of Section 17(a)(2) of the Securities Act of 1933 (*supra*, p. 2). The question is not properly subject to review by this Court, since petitioner is in no position to, and does not in his petition, attack (a) the sufficiency of the first count, which alleged the use of the mails in violation of the Securities Act, or (b) the existence of evidence that the mails were in fact used by the Georges in paying for their stock (*supra*, pp. 5-6; R. 356-358, 361-362; cf. R. 431). Since petitioner was convicted under the first count and his general sentence (R. 34-35) was less than the maximum prescribed in Section 24 of the Securities Act (*supra*, pp. 2-3), the conviction is sustainable under that count alone. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1.

In any event, the contention is without substance. Section 17(a)(2) (*supra*, p. 2) proscribes the unlawful sale of securities "by the use of any means or instruments of transportation or communication in interstate commerce * * *." It does not require that securities or a prospectus shall them-

selves move interstate.[1] It requires merely that either the mails or some means or instrument of interstate commerce be used in effectuating a fraudulent sale of securities. Hence it does not exclude from its coverage the interstate transportation of an individual for the purpose of consummating an unlawful sale.

The transportations alleged in the indictment were for the specific purpose of effecting the fraudulent sale, and were an integral part of the venture. They were, therefore, within the terms of the statute. "Interstate communication of a business nature, whatever the means of such communication, is interstate commerce regulable by Congress under the Constitution." *Associated Press* v. *Labor Board*, 301 U.S. 103, 128. See also *United States* v. *Shubert*, 348 U.S. 222, 226-227.

2. While Spencer was being examined as to his conversation with petitioner and Powell leading

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[1] *United States* v. *Monjar*, 47 F. Supp. 421, 425 (D. Del.), affirmed, 147 F. 2d 916 (C.A. 3), certiorari denied, 325 U.S. 859; *Coplin* v. *United States*, 88 F. 2d 652, 657-658 (C.A. 9), certiorari denied, 301 U.S. 703 (use of telephone to solicit purchase without transmittal of security); *Kopald-Quinn & Co.* v. *United States*, 101 F. 2d 628, 630, 632-633 (C.A. 5), certiorari denied, *sub. nom. Ricebaum* v. *United States*, 307 U.S. 628 (mailing of confirmation and not the security).

Cf. *Harper* v. *United States*, 143 F. 2d 795, 801, 802 (C.A. 8) where several counts of an indictment alleged fraudulent sale of securities by defendants by "means and instruments of transportation in interstate commerce by transporting in an automobile *themselves* and certain named persons to be defrauded." (Emphasis added.) The convictions were affirmed, although the court found it unnecessary, by reason of the validity of other counts, to decide expressly whether it was necessary that there be an actual attempt to offer the security either by the transportation in interstate commerce of a prospectus or the security itself.

up to the stock sale, he was asked if anything was "discussed there concerning financing of the company". Over objection that the question was leading and suggestive, the court ruled that when a witness states, "that is about all", it is permissible to refresh his recollection. It allowed the witness to answer that representations were made that the financing had been completed (R. 262). Later the court permitted a question as to whether statements had been made that the company had been insolvent, and Spencer answered in the negative (R. 272-274). As to this the court instructed the jury (R. 273):

> Ladies and gentlemen, the question which counsel is now asking, is only for the purpose of permitting, of getting the whole conversation from this witness. The jury is not to interpret the fact, that the question is asked, that it has been established, that any of the facts assumed in the question have been established. In other words, it is solely and only for the purpose of exhausting the witness' recollection.

Spencer was allowed to answer and stated that petitioner and Thomas did not tell him that the corporation had for many months been insolvent or that it was indebted for a sum in excess of $400,000 (R. 273-275). After a similar defense objection, the court charged (R. 274): "* * * the jury is instructed that they are not to assume from the asking of the questions, the facts cited in the questions. The facts are not established. It is

only and solely for the purpose of exhausting the witness' recollection."

A similar line of questioning with negative answers was permitted over objection in George's testimony (R. 317-320).

It was well within the sound discretion of the court to permit the questions in the context in which they were asked. Cf. *Northern Pacific Railroad* v. *Urlin*, 158 U.S. 271, 273; *United States* v. *Graham*, 102 F. 2d 436, 441 (C.A. 2), certiorari denied, 307 U.S. 643. The question to Spencer as to whether financing was discussed did not suggest the answer given—that the statement was made that the financing had been completed. As to the questions which are alleged to have assumed facts, such as whether the indebtedness had been revealed, they all related to express averments in the indictment as to omissions of material facts (R. 4, 5, 6). The logical manner of proving that the defendants, in their conversations with Spencer and George, omitted certain facts specified in the indictment, was to ask them directly if the conversation covered these. Otherwise the jury might not be reasonably certain as to whether these statements were or were not omitted. Cf. Wigmore on *Evidence*, 3rd ed., § 664.

Although the questions were based on the evidence previously introduced,[2] the court was care-

[2] Evidence had been introduced to the effect that the company was insolvent and had liabilities of $400,000 (R. 76, 73-74); and that the company had unsuccessfully attempted to obtain both public and private financing (R. 63, 66, 67, 76, 85, 100-101).

ful to instruct the jury that they were not to assume *from the questions* that the facts embodied therein had been established (R. 273, 274).

CONCLUSION

The decision below is correct and is in full accord with the applicable decisions of this Court. There is no conflict among the circuits; no important question is raised; and there is no occasion for further review. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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